Appeal No. 48383-1-II
Superior Court No. 15-2-05879-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

SOUTH SOUND CHARITIES, INC., et al,

Appellants,

v.

UNION STREET HOLDINGS, LLC,

Respondent.

APPELLANT'S BRIEF

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March 24, 2016

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COMES NOW the Appellants, SOUTH SOUND CHARITIES, ("Charities) by and through its attorney Martin Burns of Burns Law, PLLC, and submits their Appellate Brief to the Court of Appeals as follows:

I. ASSIGNMENT OF ERRORS

Error No. 1: Did the trial court err in not dismissing the complaint for lack of jurisdiction prerequisites as the Plaintiff was not a purchaser at the trustee sale so as to invoke RCW 59.12.032 through RCW 61.24.060?

Error No. 2: Did the trial court err in not allowing a trial on whether there was a properly conducted trustee sale under RCW 61.24.040 and RCW 61.24.060 so as to invoke the ability to utilize the unlawful detainer proceedings pursuant to RCW 59.12.032?

Error No. 3: Did the trial court/commissioner err in limiting possession to a set date prior to trial as opposed to simply setting the matter to trial?

Error No. 4: Did the trial court err in proceeding under an unlawful detainer action and ordering Charities to vacate when there was an acknowledged lease under which the Respondent accepted rent?

Error No. 5: Did the trial court err in proceeding in unlawful detainer when an issue of paramount title as to the possessory interest was presented by the existence of Charities' lease, Respondent's knowledge thereof which preexisted Respondent's interest?

Error No. 6: Did the trial court err in err in ignoring the writ process and summarily order Charities to vacate?

Error No. 7: Did the trial court err in in not allowing trial on the pleaded affirmative defenses including when defendant relied upon representations of Respondent's predeceasor, acted under such arrangement (to the benefit of Respondent and its predecessor) and Charities would be damaged if Respondent were able to repudiate or contradict its prior representations?

A. Issues related to the Assignment of Errors

1. Issues pertaining to Error No. 1: Can anyone other than the "purchaser at a trustee sale", as explicitly specified in RCW 61.24.060, commence an unlawful detainer under RCW 59.12.032?

2. Issues pertaining to Error No. 2: Can a court summarily decide that a there was a properly conducted trustee sale under RCW 61.24.040 when material issues of fact arose as to the conduct of the trustee and beneficiary in conducting the sale demonstrated by contradicting declarations, attempts to use an incorrect date of an assignment and communication from the beneficiary' attorney?

3. Issues pertaining to Error No. 3: Can a court commissioner order payment of rent and restrict occupancy at the same time it orders the matter to be tried?

4. Issues pertaining to Error No. 4: Does acceptance of rent during the pendency of an unlawful detainer terminate the ability to further proceed in a limited jurisdiction proceeding?

5. **Issues pertaining to Error No. 5:** Is an unlawful detainer proceeding inappropriate when a plaintiff accepts an assignment of rights from a purchaser at a trustee sale with full knowledge of the existence of an unrecorded lease and possessory interest of a party and then accepts rent therefrom?

6. **Issues pertaining to Error No. 6:** Can a court ignore the "exclusive remedy" of a writ of restitution to restore possession to a plaintiff and simply order a tenant or occupant to simply "vacate"?

7. **Issues pertaining to Error No. 7:** Can a court ignore affirmative defenses and deny a defendant their ability to set forth defenses at trial and summarily decide the issue of possession?

II. STATEMENT OF THE CASE

a. Brief Overview

This appeal is between a wholly owned subsidiary of a bank that had performed a nonjudicial foreclosure and the subsidiary then filed an unlawful detainer action against the Appellant which ran a soccer facility on the subject property which had many leagues and thousands of participants. At a preliminary hearing, the matter was set for trial conditioned upon two payments of $22,000 which had been the rent amount. In another pretrial hearing, the trial court interlineated on an order that the Appellant was to vacate on a day that was before the trial with no writ issued. The Respondent then used the Tacoma Police Department to exclude the Appellant based on such order and retook possession. This appeal follows.

b. Procedural Facts

This case was commenced by the Plaintiff UNION STREET HOLDINGS, LLC ("Union Street") against the defendant SOUTH SOUND CHARITIES, INC. ("Charities") on February 29, 2015. CP 1-30 Despite a return date of February 23, 2013 in the summons (CP 31-32), a motion was set for a writ of restitution to be heard on February 18, 2015 on shortened time. CP 33-70. At such hearing the court commissioner (1) set the matter for trial before Judge Kathleen Stolz; (2) ordered Charities to pay Union Street $22,000 on February 20, 2015 and March 1, 2015; and (3) ordered that Charities right to occupy the subject building was extended until March 7, 2015 but Charities could not solicit or enter into new leagues or other activity. CP 123-124.

Trial was set for March 26, 2015 before Judge Stolz. Charities set a motion to extend its occupancy which was heard on March 06, 2015. CP 130-163. In denying the motion, Judge Stolz interlineated "Defendant is required to vacate no later than midnight on March 7, 2015." CP 198-199. As discussed in the below section, Union Street used the Tacoma Police to expel Charities' shortly before such time. On March 12, 2015 Charities brought a motion to dismiss the case and for lack of jurisdiction. CP 202-239. The motion was heard on March 20, 2015 and was denied. CP 430-431.

The parties appeared at trial on March 26, 2015 before Judge Stolz. CP 443-444. The undersigned attorney asserted that possession was at issue. CP 444. The trial court refused to hold trial (CP 444) but rather

entered and order holding "[Union Street] is entitled to possession of the property described as 7845 South Pine Street, Tacoma, Pierce County, Washington." CP438-440. The court then issued a new case scheduling order setting trial on December 8, 2015. CP 441.

Charities sought discretionary review on April 17, 2015 which was denied by Commissioner Eric B. Schmidt. As the case neared trial, Union Street sought dismissal of the case without prejudice or continuance. CP 451-454, 466-467. In such motion, Union Street contended that possession was decided and in that it was waiving its claims for cost the matter could be dismissed. CP 451-454. Charities objected to the dismissal without prejudice as it would leave it nothing to appeal the prior rulings as the effect of a dismissal without prejudice would be to render void all prior orders as if the case had never existed. CP 470-476. An order was entered dismissing the case with prejudice and noting the order was a final order. CP 481-482. This appeal followed.

c. Facts

South Sound Sports Management, Inc ("Management") borrowed money from Fortune Bank which it secured with a deed of trust on property known as 7845 South Pine Street, Tacoma, WA 98409. CP 2. Fortune Bank merged with HomeStreet Bank. CP 2. Management rented the property to South Sound Sports Ventures, Inc. ("Ventures") which operated a soccer facility on the subject property. CP 3. In April 2013, a $492,141 judgment was entered against Ventures. CP 3. A principal in the Management and Ventures, Marian Bowers, met with officers of

Fortune Bank including its then president David Straus. CP 101. At such meeting was to confirm that the soccer center would continue. However, given that Ventures could not pay the judgment, it would be terminated from its lease and Management would then enter into a different lease with Charities. CP 101-102. At the meeting with Fortune Bank on May 29, 2013, Management got permission to enter into a lease with Charities. CP 102. Thereafter a long term lease was entered into between Charities and Management. CP 106-113. In reliance upon such assurances by the Bank's commitment, Charities entered into agreements for soccer leagues and other events. CP 102.

Management filed for Bankruptcy protection under Chapter 11 to stop a nonjudicial foreclosure by Fortune Bank. During the course of such bankruptcy Charities paid rent through a cash collateral account set up by the bankruptcy court with full knowledge of HomeStreet bank. CP 103. The Charities' lease had a term from June 1, 2013 through May 31, 2027 with rent of $22,000 per month. CP 103. HomeStreet received relief from stay from the bankruptcy court on November 20, 2014. CP 257. It recommenced its trustee sale and completed the sale on January 16, 2015. CP 257. Charities lease was unrecorded. CP 43. HomeStreet did not provide notice to Charities of the trustee sale. CP 43.

In a Declaration of Kathleen J. Johanson filed on February 11, 2015, she testified to being a vice-president of HomeStreet Bank and that: "At the foreclosure sale, the Bank was the successful bidder. Following the foreclosure sale, the foreclosure Trustee issued its Trustee's Deed to

Plaintiff Union Street Holdings, LLC as assignee and successor to the interest of HomeStreet Bank." CP 41. It was pointed out by Charities that such representation was in conflict with the trustee deed representation. CP 202-222. The trustee deed provided that "...the Trustee then and there sold at public auction to said grantee, the highest bidder therefore the property hereinabove described, for the sum of $3,469,139.00" CP 18-19. The Grantee of the Trustee Deed was Union Street. CP 18. One week later, Ms. Johanson changed her testimony in a declaration testifying: "On January 8, 2015, HomeStreet Bank, as the successor in interest to Fortune Bank, executed the 'Assignment of Deed of Trust' and assigned the rights and title to the Deed of Trust to its wholly owned subsidiary, Union Street Holdings, LLC....On January 16, 2015, the nonjudicial sale was conducted. I attended the foreclosure sale as an agent of Union Street Holdings, LLC and placed a successful bid for the property on behalf of Union Street Holdings, LLC." CP 257. The Assignment Document was attached to the complaint and while it was nominally dated on January 8, 2015, it was executed on January 21, 2015 as shown by the notary jurats – five days after the trustee sale. CP 306-308. Charities pointed out that this was a "credit bid" situation.[1] CP 213-214; 417-418. It was not

[1] A credit bid is where a beneficiary bids all or a portion of their debt at the sale in accordance with RCW 61.24.060(2) which provides in part: "The trustee shall, at the request of the beneficiary, credit toward the beneficiary's bid all or any part of the monetary obligations secured by the deed of trust."

contested and there is no record of any tender of actual funds, and surplus deposited with the court or other contradictory facts.

Thereafter, Union Street brought the instant action and at a commissioner's hearing, sought a writ of restitution. CP 35-39. The trial court set the matter for trial but ordered two payments of $22,000. CP 123-124. Charities paid the $22,000 directly to Union Street on February 19, 2016 and February 28, 2014. CP 224, 236-237. Union Street accepted the payments. CP 224.

After the trial court ordered Charities to vacate no later than midnight on March 7, 2015, at 10:30 p.m. on March 6, 2015, a HomeStreet Bank security officer arrived at the premises to change the locks. CP 238. An officer of Charities protested that there was no writ of restitution. CP 238. The security officer called the police and the Tacoma Police arrived. CP 238. The police were shown the June 6, 2014 order and threatened the Charities officer with arrest despite the officer pointing out there was an upcoming trial and there was no writ of restitution. CP 238. The same security officer had previously entered the property on February 24, 2015. CP 238-239.

III. ARGUMENT

a. The trial court lacked jurisdictional prerequisites to proceed in unlawful detainer as Union Street was not a purchaser at a trustee sale.

The unlawful detainer statute is in derogation of common law, and must therefore be strictly construed in favor of the tenant. "By reason of provisions designed to hasten the recovery of possession, the statutes creating it remove the necessity to which the landlord was subjected at common law, [*sic*] of bringing an action of ejectment [under Chapter 7.28 RCW] with its attendant delays and expenses." However, in order to take advantage of its favorable provisions, a landlord must comply with the requirements of the statute. (footnotes omitted) Hous. Auth. of City of Everett v. Terry, 114 Wn.2d 558, 563-64, 789 P.2d 745, 748 (1990).

RCW 61.24.060 clearly and unambiguously allows only the "purchaser at a trustee sale" to proceed under RCW 59.12. Per Union Street's own complaint, Respondent did not purchase at the trustee sale but later took an assignment. As discussed below, Union Street's own testimony is contradictory on such point. Regardless, the statute it is not unclear that only "the purchaser at the trustee sale" as opposed to "an assignee of the purchaser at the trustee sale" can utilize RCW 59.12. This is not a situation where a court is supposed to say "close enough" or "I think the legislature really meant...."

> "A court's objective in construing a statute is to determine the legislature's intent." *Tingey v. Haisch,* No. 77689–0, 159 Wash.2d 652, 657, 152 P.3d 1020, 1023 (2007). " '[I]f the statute's meaning is plain on its face, then the court must give effect to that plain

> meaning as an expression of legislative intent.' " *Id.* (alteration in original) (internal quotation marks omitted) (quoting *State v. Jacobs,* 154 Wash.2d 596, 600, 115 P.3d 281 (2005)). Plain meaning is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Id.* at 1023.

Udall v. T.D. Escrow Servs., Inc., 159 Wn.2d 903, 909, 154 P.3d 882, 886 (2007). Case law is quite clear that a court is supposed to read what the statute says – not what the court thinks the legislature might have meant:

> "The initial principle of statutory interpretation is we do not construe unambiguous statutes: 'In judicial interpretation of statutes, the first rule is "the court should assume that the legislature means exactly what it says. Plain words do not require construction".' *State v. McCraw,* 127 Wash.2d 281, 288, 898 P.2d 838 (1995) (quoting *City of Snohomish v. Joslin,* 9 Wash.App. 495, 498, 513 P.2d 293 (1973)), *superseded by statute as cited in State v. Bolar,* 129 Wash.2d 361, 917 P.2d 125 (1996)."

Davis v. State ex rel. Dep't of Licensing, 137 Wn.2d 957, 963-64, 977 P.2d 554, 556 (1999). Davis has a footnote that provides: "'We do not inquire what the legislature meant; we ask only what the statute means.' Oliver Wendell Holmes, *The Theory of Legal Interpretation,* 12 Harv. L. Rev. 417, 419 (1899). '[I]t seems axiomatic that the *words* of a statute – and *not* the legislators' intent as such – must be the crucial elements both in the statute's legal force and in its proper interpretation." Laurence H. Tribe, Constitutional Choices 30 (1985)." Davis at 964 ft. nt. 1. RCW 61.24.060 and repeatedly discusses "purchaser at the trustee sale":

> **61.24.060.** Rights and remedies of **trustee's sale purchaser**--Written notice to occupants or tenants

(1) **The purchaser at the trustee's sale** shall be entitled to possession of the property on the twentieth day following the sale, as against the borrower and grantor under the deed of trust and anyone having an interest junior to the deed of trust, including occupants who are not tenants, who were given all of the notices to which they were entitled under this chapter. **The purchaser** shall also have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.

(2) If the trustee elected to foreclose the interest of any occupant or tenant, **the purchaser of tenant-occupied property at the trustee's sale** shall provide written notice to the occupants and tenants at the property purchased in substantially the following form: ...

2. If you are a tenant or subtenant in possession of the property that was purchased, pursuant to RCW 61.24.146, **the purchaser at the trustee's sale** may either give you a new rental agreement OR give you a written notice to vacate the property in sixty days or more before the end of the monthly rental period."...

The definitional section of RCW 61.24.050 does not define such an obvious term of "purchaser at the trustee sale" or attempt to expand it beyond its clear meaning. If the legislature wanted a remedy for anyone in the chain of title it could have added the terms "...and successors or assignees" It did not. The post-foreclosure remedy of an unlawful detainer action is reserved solely to purchasers at a trustee sale. Respondent is not a purchaser at a trustee sale and is unable to file under RCW 59.12.032.

In this courts order denying discretionary review, the ruling pointed to general notions of contractual law related to an assignee succeeding to all of the rights of the assignor. While that is not incorrect, this very court rejected a similar argument when dealing with an assignee of a purchaser's interest in a real estate contract having standing to

commence an action to set aside the forfeiture. Schultz v. Werelius, 60 Wash. App. 450, 803 P.2d 1334 (1991). In such case, assignee appears to have sought to set aside the forfeiture under RCW 61.30.140 which limits standing to people entitled to get notice under RCW 61.30.040(1) and (2). The assignee in such case made the very point that the order denying discretionary review made – that he had been transferred all of the purchaser's rights "including the right to commence an action to set aside the forfeiture." Id. at 453. This is extremely similar to the claim in this case. This court rejected such argument pointing to the plain language of the statute and how there is a difference between rights conferred by contract and rights conferred by statute:

> Despite the plain words of the statute, Schultz argues that the assignment he received from Snook transferred all rights in the property, including the right to commence an action to set aside the forfeiture. It is true that contract rights are assignable unless the assignment is forbidden by statute or violative of public policy, *International Comm'l Collectors, Inc. v. Mazel Co., Inc.*, 48 Wash.App. 712, 716-17, 740 P.2d 363 (1987). This principle, however, does not help Schultz, for the right to commence an action to set aside a forfeiture is conferred by statute, not by contract. Had the Legislature intended to extend standing to assignees of assignments recorded after the notice of intent to forfeit, the forfeiture act would have so stated.

Schultz v. Werelius, 60 Wash. App. 450, 453, 803 P.2d 1334, 1336 (1991). Just as in such case, had the Legislature intended under RCW 61.24.060 "to extend standing to assignees of assignments" to parties other than the purchaser at a trustee sale, the "act would have so stated." The

Schultz court went on to discuss how there would possibly other remedies for such an assignee. Id. at 454. In the present case, to the extent that Union Street could not proceed in unlawful detainer, there would be a general action possibly under ejectment.

In addition to the problem with such an assignee so proceeding, Union Street's standing as an assignee is not at all clear. In an attempt to avoid the implications of the plain language, Union Street reversed its legal position by contradicting its own complaint and submitting a clearly conflicting declaration of a bank vice president in response to Petitioner's Motion to Dismiss to assert there was a January 8, 2015 assignment thus claiming the Union Street was in fact a purchaser at a trustee sale. However, the document was not even executed and notarized until five days after the trustee sale. Union Street cites no law how an assignment of a deed of trust can be essentially backdated prior to the notarized date of execution. The deed of trust act discusses how such arrangement is a "deed conveying real property to trustee to secure performance of an obligation...." RCW 61.24.020. Cases discuss how a deed of "trust beneficiary's interest in real property" as being superior to other interest in property. *See* In re Upton, 102 Wash. App. 220, 6 P.3d 1231 (2000). Being an interest in real property, the conveyance of such interest has to be by deed per RCW 64.40.010 which provides in pertinent part: "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." It is blackletter law that deeds are valid upon execution and

delivery. "All conveyances of real estate or of any interest therein, and all contracts creating or evidencing any incumbrance thereon, must be by deed, and a deed must be in writing signed and acknowledged." Olson v. Springer, 60 Wash. 77, 79, 110 P. 807, 808 (1910). "The law applicable to cases of this kind is that a deed, in order to be effective to pass title, must be delivered by the grantor to the grantee." Anderson v. Ruberg, 20 Wash.2d 103, 107, 145 P.2d 890, 893 (1944). It is sanctionable conduct for an attorney to backdate a real estate deed. In re Disciplinary Proceeding Against Kuvara, 149 Wash. 2d 237, 243, 66 P.3d 1057, 1059 (2003). In re Boland, 140 Wash. 148, 248 P. 399 (1926). The undersigned is not alleging that the opposition is acting unethically – there is really no backdating – it is just obvious that the document was not executed until at least January 21, 2015 and could not have been effective prior to the January 16, 2015 trustee sale. At a minimum, there is a genuine issue of material fact that should be submitted to a trial as to even if Union Street was an assignee prior to the trustee sale or after. The case needs to be tried where the credibility of Union Street's witnesses can be judged – the primary one – Ms. Johansen a vice president of Homestreet Bank and an agent for Union Street clearly provided conflicting testimony without any explanation.

While there is no dispute as to the exact dates and contents of the purported assignment, at the very least it would raise factual issues and credibility issues to be resolved at trial. The decision of the trial court to (1) just ignore this threshold issue, (2) ignore the conflict in the

Respondent's pleadings, (3) ignore the judicial admissions of Union Street that the Bank (not the Union Street) was the purchaser at the trustee's sale and just let the matter proceed even when, as a matter of fact and law, the assignment was executed after the trustee sale and Respondent could not have been a purchaser at a trustee sale was error. If a party does not fit clearly within the scope to which the expedited unlawful detainer actions apply – the court has no jurisdiction to hear the matter. This happens all the time when parents or family members try to evict another family member who they let live somewhere without rent. Such situation is a tenancy at will and is not under RCW 59.12 but is an ejectment action. Turner v. White, 20 Wash. App. 290, 579 P.2d 410 (1978). Given that this dispute is beyond the limited authority of RCW 59.12, this court has no jurisdiction to decide the matter:

> An unlawful detainer action under RCW 59.12.030 is a summary proceeding designed to facilitate the recovery of possession of leased property; the primary issue for the trial court to resolve is the "right to possession" as between a landlord and a tenant. *Port of Longview v. Int'l Raw Materials, Ltd.,* 96 Wash.App. 431, 436, 979 P.2d 917 (1999); *see also Munden v. Hazelrigg,* 105 Wash.2d 39, 45, 711 P.2d 295 (1985). It is well settled in Washington that,
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> > [i]n an unlawful detainer action, the court sits as a special statutory tribunal to summarily decide the issues authorized by statute and *not* as a court of general jurisdiction with the power to hear and determine other issues.
>
> *Granat v. Keasler,* 99 Wash.2d 564, 571, 663 P.2d 830, *cert. denied,* 464 U.S. 1018, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983). Thus, an unlawful detainer action is a "narrow one, limited to the question of possession and related issues such as restitution of the premises and rent." *Munden,* 105 Wash.2d at 45, 711 P.2d 295.

Angelo Prop. Co., LP v. Hafiz, 167 Wn. App. 789, 808-09, 274 P.3d 1075, 1085 (2012) review denied, 175 Wn.2d 1012, 287 P.3d 594 (2012).

Being a subsequent assignee is not the same as being a purchaser at a trustee sale. A trustee sale is defined as "a nonjudicial sale under a deed of trust undertaken pursuant to this chapter." RCW 61.24.005(17). The trustee sale must be at specific times: "The sale shall be on Friday, or if Friday is a legal holiday on the following Monday...." RCW 61.24.040 (5). The Plaintiff acquired its interest on Wednesday February 21, 2015. By statute, it was not "at the trustee sale." Respondent is not (1) a purchaser, (2) at a trustee sale.

b. The trial court erred in proceeding in unlawful detainer as there was not a proper trustee sale under RCW 61.24.040 and 61.24.060.

Similar to the preceding argument, this court should find that in addition - or alternately - to not having standing, there are triable issues of fact as to if there was a proper trustee sale. RCW 59.12.032 allows the use of the unlawful detainer proceeding after a trustee sale but qualifies that the trustee sale must comply with RCW 61.24.040 and 61.24.060. It is important in considering this case to recall the trial court summarily ordered Charities to vacate. There was no trial on such issue. As such, it is most analogous to a summary judgment wherein, on appeal, the court reviews issues of law de novo and views all facts and inferences drawn from such facts in the light most favorable to Charities. Halme v. Walsh, No. 47129-9-II, 2016 WL 917769, at *4 (Wash. Ct. App. Mar. 8, 2016). There are facts in the record that HomeStreet Bank was the buyer at the

trustee sale – the complaint says so, an email from HomeStreet and Union Street's attorney said so as did the first declaration of Ms. Johansen. CP 3, 41, 228. However, there are also facts and argument in the record, and absence from the record, that the sale was a credit bid situation. CP 212-213; 417-418. There is no showing that there was any cash changing hands and there is no record of any surplus being deposited into the registry of the court as would be the case if there was bidding beyond the debt amount. It is a logical inference given the trustee deed. There is also testimony (conflicting) that actually Union Street was the bidder and that it had an assignment. It is well within the range of testimony that at the time of the sale, the assignment had not been executed as the sale occurred on January 16, 2015 and the assignment was executed per the notary jurats on January 21, 2015. It is also within the range of evidence that the sale was to Union Street as testified to Ms. Johansen (albiet conflicting with earlier testimony) and as shown in the Trustee's Deed. CP 19.

RCW 61.24.040(6) is not unclear that at the sale the purchaser is to pay the bid price "forthwith". "'Forthwith' is undefined in the statute. We may then look to its ordinary meaning. Black's Law Dictionary defines 'forthwith' as '[i]mmediately; without delay.'" (footnotes omitted) Keithly v. Sanders, 170 Wash. App. 683, 689, 285 P.3d 225, 228 (2012). There is more than an inference that no money was paid by Union Street to the Trustee and that it attempted to do a credit bid. A credit bid would be allowed if one was a beneficiary under RCW 61.24.070(7). However, if Union Street was not then a beneficiary, it would not have the right to

credit bid at the sale. The presence of an assignment executed five days after the sale raises the issue that, at a minimum, Union Street was not the beneficiary at the time of the sale and hence could not credit bid. Combining the distinct possibility that Union Street was not a beneficiary and that Union Street credit bid to the trustee creates a strong case that the sale violated the terms of RCW 61.24.060 as Union Street, the buyer per the trustee's deed, never tendered the bid amount in violation of RCW 61.24.040(7) and hence did not comply with RCW 61.24.040 as required by RCW 59.12.032 so as to be able to commence an unlawful detainer. A statutorily compliant trustee sale is a requisite to proceeding in unlawful detainer. The courts have always strictly construed the need for compliance with such prerequisites to be able to commence an unlawful detainer. While courts have quibbled over whether or not there is jurisdiction or if the court would be precluded from exercising jurisdiction, the end result if a party does not comply with the prerequisites to commencing an unlawful detainer, such as three-day the case is to be dismissed and the tenant remain in possession.[2] "The statutory action for unlawful detainer is a creation of the legislature and is a procedure unknown to the common law. Indeed, the common law action of enjectment [sic] is separate from and in addition to the action for

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[2] Hous. Auth. of City of Seattle v. Bin, 163 Wash. App. 367, 373, 260 P.3d 900, 903 (2011) has a discussion over the various court decisions and how they differ from a court being without jurisdiction to a court not exercising jurisdiction if the prerequites were not performed.

unlawful detainer. *Petsch v. Willman*, 29 Wash.2d 136, 185 P.2d 992 (1947); 1 H. Tiffany, Real Property s 180 (B. Jones 3d ed. 1939). The statutory action is summary, *MacRae v. Way*, Supra; *Young v. Riley*, 59 Wash.2d 50, 365 P.2d 769 (1961); *Petsch v. Willman*, Supra, and the plaintiff must strictly adhere to the statutory procedure. Failure to follow the statute defeats the court's jurisdiction, *Sowers v. Lewis*, 49 Wash.2d 891, 307 P.2d 1064 (1957); 33 Wash.L.Rev. 165 (1958), which is in any event limited." Kessler v. Nielsen, 3 Wash. App. 120, 122-23, 472 P.2d 616, 618 (1970). There is, at a minimum, a question of fact as to which entity bid at the sale, how the funds were tendered, if at all, and when the assignment took place. Taking such facts and inferences in the light most favorable to Charities, the court should not have summarily ordered Charities to vacate.

Again, this is not a situation where a court can say "close enough" without doing violence to prior precedent. "Our legislature has allowed that power to be placed in the hands of a private trustee, rather than a state officer, but common law and equity requires that trustee to be evenhanded to both sides and to strictly follow the law." (citation omitted) Klem v. Washington Mut. Bank, 176 Wash. 2d 771, 789, 295 P.3d 1179, 1188 (2013). While Union Street and HomeStreet are related, they are separate legal entities. RCW 25.15.071(3) and prior RCW 25.15.070(2)(c). The trustee in this case allowed a non-beneficiary to credit bid and hence conducted a sale that did not comply with RCW 61.24.040. This was a problem HomeStreet's making. It could have properly assigned the note

and deed of trust before the sale or it could have bought in its own name, conducted the eviction and then transferred to Union Plaza. Instead, it has engaged in an impermissible hybrid of the two and has given the court conflicting versions of what occurred and tried to rely on potentially backdated documents. This court would be well within its rights to set forth that there was no proper sale and that the action does not comply with RCW 59.12.032 and dismiss the matter outright. At the least, it should be remanded for trial where the record can be completed.

c. The trial court erred in limiting Charities' use and possession prior to a trial and determining an end date of possession.

As has been pointed out numerous times already, unlawful detainers are statutory creations and must be strictly complied. Also, as discussed, the court sits in limited jurisdiction constrained by the terms of the statute. The obvious must be pointed out: There is nothing in RCW 59.12 that allows a court to order payment of rent in the interim of an unlawful detainer action. In this case, the court commissioner recognized there were triable issues of fact and referred it to the department for trial. However, then it added that if two payments of $22,000 were not paid, that it would immediately issue a writ. How would the future payment or nonpayment of rent during the pendency of the litigation change the then existing factual issues upon which the commissioner referred the case for trial? No doubt that at trial a court can determine ancillary issues of damages such as rent owed. Sprincin King St. Partners v. Sound Conditioning Club, Inc., 84 Wash. App. 56, 66, 925

P.2d 217, 222 (1996). But there is no authority for a trial court to order payment of rent in the interim of an unlawful detainer. In fact, as discussed below, the payment and acceptance of rent by a landlord in the pendency of an unlawful detainer destroys the ability to proceed further with the unlawful detainer. *See*, Wilson v. Daniels, 31 Wash.2d 633, 640, 198 P.2d 496, 500 (1948). The record, in the light most favorable to Charities shows that the $22,000 was rent as it was the amount set forth in the Charities lease. CP 61. The record reflects the rent for February and March 2015 was tendered to HomeStreet and accepted. CP 223-224. Given that Charities had a right to then occupy the property during the time of the payment of rent, an unlawful detainer while the tenant is occupying the premises under the payment of rent is inappropriate. "The payment of rent merely gives the tenant the right of possession of the premises during the term, but it does not, during that term, give him the right to violate other provisions of the lease. Although the acceptance of rent waives the right to declare a forfeiture for prior breaches, it does not operate as a waiver of a continuance of the breaches or of any subsequent breaches." Wilson v. Daniels, 31 Wash.2d 633, 640, 198 P.2d 496, 500 (1948).

Here, the court was in error in ordering rent be paid. It had no jurisdiction to do so as such power is not conferred by statute and doing so can eviscerate an unlawful detainer under case law. Further the court compounded its error when it determined that Charities could continue in possession until March 7, 2015. It seems almost axiomatic that if in an

unlawful detainer action, the court is to have a trial on the primary issue in all unlawful detainer cases – Possession[3] – that it is error to prejudge the trial result and restrict a defendant's possession until there is a judgment of unlawful detainer. Put otherwise, if a trial determined there was no unlawful detainer, there would be no basis for a court commission to restrict a tenant's pretrial use of the real property at issue. It is not as if the Legislature could not have required a tenant to deposit money into the registry of the court as provided in RCW 59.18.375(2). Rather, recognizing that there was a need for expediency, the legislature provided that such issues would be tried and "take precedence over all other civil matters." RCW 59.12.130. While one might argue if such remedy is enough - that is an issue for the Legislature. The court commissioner was in error for both ordering payment of rent and restricting possession prior to trial. The trial court compounded the error by summarily ordering Charities to vacate without a trial when there were factual issues and defenses to be tried. The end result is the wrongful deprivation of Charities' possession in a writless execution enforced – not by the sheriff who serves writs – but by the Tacoma Police Department. The court orders must be ruled in error and possession restored to Charities.

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[3] Munden v. Hazelrigg, 105 Wash. 2d 39, 45, 711 P.2d 295, 298 (1985).

d. The trial court erred in not dismissing the action after Union Street took its interest with knowledge of Charities possession and accepted rent in the pendency of the unlawful detainer.

As alluded to above, a landlord cannot sustain an unlawful detainer action while simultaneously accepting rents. Acceptance of rents is a waiver to declare a forfeiture based upon such rents. M H 2 Co. v. Hwang, 104 Wash. App. 680, 684, 16 P.3d 1272, 1274 (2001). Such decision held that by accepting the rents "possession is no longer an issue after acceptance of advance rent for the forthcoming month." Id. at 684. The commissioner's order, by its terms written in February 2015 and spanning into March 2015, required the payment of the $22,000 in February and on March 1, 2015. The payment is clearly rent as it equals the prior rental amount. Further, it is paid in return for the use of property. That is what rent is. Given that Charities paid HomeStreet the rent directly and HomeStreet accepted it – Charities, at a minimum, would have had the right to stay until the end of March, 2015. That being the case, an unlawful detainer action prior to such time would be inappropriate and should be dismissed as occurred in M H 2 Co. v. Hwang. Other cases have similarly ruled that accepting rent can bar a filing of an unlawful detainer action. Commonwealth Real Estate Servs. v. Padilla, 149 Wash. App. 757, 765, 205 P.3d 937, 941 (2009) (acceptance of rent after pay rent or vacate notice justified dismissal of action as a matter of law). Wilson v. Daniels, 31 Wash. 2d 633, 639-40, 198 P.2d 496, 500 (1948) (Cashed payment after notice to pay or vacate justified dismissal).

No doubt, HomeStreet will argue that it was simply following a court order. Case law says a party cannot accept the benefits of an order and then blame the court. Lyons v. Bain, 1 Wash. Terr. 482, 483-4 (1875). The acceptance of a court's ruling has been held to be a waiver of such issue on appeal "because the appellate court might rule that the appellant is not entitled to those benefits" (citation omitted) Chan v. Smider, 31 Wash. App. 730, 734, 644 P.2d 727, 730 (1982). The point being, is that if you accept the benefit of the court order, it essentially cuts off that issue for further review. In the present case, the trial court ordered the payment of the $44,000 of rent and Union Street accepted it. Thereafter, Union Street should have been precluded from proceeding further as it had accepted the rent for February and March, 2015. Union Street, again, had options ot avoid such a situation. It could have moved for reconsideration or revision. It could have appealed. It could have refused tender. It could have asked the funds go into the registry of the court. But it did not and accepted rent for February and March 2015 – which should have precluded any effort in such months to evict Charities.

Now, it is fully expected that Union Street will argue that it was not kicking Charities out for non-payment of rent but rather as a holdover after the end of non-judicial foreclosure. Further, it will argue that the Charities' lease had been extinguished by non-judicial foreclosure. While the undersigned will argue below that such proposition is incorrect, the court should consider what the effects would be for a party who has no lease (assuming *arguendo* that it was extinguished) and who then pays

rent which is accepted by the landlord. That would create an informal lease that could be terminated only upon a 20-day notice under RCW 59.12.030(2).[4] *See* Vance Lumber Co. v. Tall's Travel Shops, 19 Wash. 2d 414, 417, 142 P.2d 904, 906 (1943) (oral lease creates a month to month tenancy). Again, this is a problem created as Union Street want to have its cake and eat it too. It wanted possession of the property and it wanted the rents. By accepting the rents it then, at a minimum, created a month to month lease that would be terminable on twenty days' notice. In any event, if it accepted rents through the end of March, 2015 – Union Street had no business retaking possession on March 7, 2015.

The court should not have ordered the payment of the $44,000 but in accepting it, Union Street not only waived the forfeiture, it either created a new month to month tenancy or, as argued below, acknowledged the written Charities lease and waived its forfeiture. In any event the trial court was in error to simply order Charities "to vacate no later than midnight on March 7, 2015." Such orders must be vacated and the action remanded to the trial court to restore Charities to possession and dismiss the case.

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[4] "When he or she, having leased property for an indefinite time with monthly or other periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, when the landlord, more than twenty days prior to the end of such month or period, has served notice (in manner in RCW 59.12.040 provided) requiring him or her to quit the premises at the expiration of such month or period" RCW 59.12.030(2).

e. <u>The trial court erred in proceeding in unlawful detainer when Charities asserted a paramount right to possession.</u>

By record reflects that both HomeStreet and Union Street were fully aware of the Charities' lease. There is testimony in the record that there was a meeting wherein HomeStreet officials approved of the lease to Charities. CP101-102. There are two legal reasons why the Charities lease is still in full force and effect. First, given the improper sale and credit bidding by a nonbeneficiary, the trustee sale was invalid and did not extinguish the lease. Second, even assuming there was a proper trustee sale, Union Street took an assignment five days after the trustee sale with full knowledge of Charities possession. Thereafter the acceptance of the rents was an acknowledgement of the prior lease and a waiver of its forfeiture.

If the trustee sale did not comply with RCW 61.24.040, as set forth by Appellant above, the sale was not consummated as Union Street, who claims to have been the purchaser at the sale, did not tender the funds but tried to credit bid even though its assignment was executed five days later. Recall, there must be strict compliance with the statute to divest a party of its property. <u>Albice v. Premier Mort. Services of Washington, Inc.,</u> 174 Wash.2d 560, 567, 276 P.3d 1277 (2012). Procedural irregularities can invalidate a sale. <u>Id.</u> At a minimum there is a triable issue as to Union Street's status at the time of the trustee sale and how it paid for the property given the later executed assignment. However, given that the trial

court summarily deprived Charities of its trial by ordering its immediate vacation of the subject property, this court again should treat this as a summary judgment (as the March 6, 2015 order as to possession was extremely summary). In doing so, viewing the facts and inferences in Charities' favor: (1) the trustee sale did not comply with RCW 61.24.060 and hence did not terminate the Charities lease; Union Street took an assignment of the beneficiary's rights with full knowledge of Charities' lease; and (3) accepted rent thereunder. This means that such assignee would take subject to the Charities' lease. This raises a further complication in that it would bring into question who had paramount rights to possession of the property. Leases are, in essence, a conveyance of land for a period of time with the lessor retaining a reversionary interest in the property. *See* Pruitt v. Savage, 128 Wash. App. 327, 331, 115 P.3d 1000, 1002 (2005) (landlord and management company not a possessor of leased land). Ejectment cases decide paramount title. If there is a lease, then presumptively the lessee would have the possessory interest for the term of the lease and the lessor would hold the reversionary interest. But such issue is far beyond the scope of the limited jurisdiction afforded trial court in an eviction action.

As it relates to acquiring interests in real property, normally Washington follows the "race" rules set forth in the recording act,

RCW 65.08.070. However, that only applies to bona fide purchasers who take without knowledge. Miebach v. Colasurdo, 102 Wash. 2d 170, 175-76, 685 P.2d 1074, 1078 (1984). Recording imparts constructive knowledge. In this case, recording is irrelevant as there is plenty of evidence that Union Street and its parent company HomeStreet had full knowledge of the Petitioner's lease. By accepting an assignment of Homestreet's interest actually knowing there was a tenant occupying the building, Union Street took subject to such possessory interest. Case law provided discusses how parties can acquire their interest subject to unrecorded interests such as where a bankruptcy trustee was charged with knowledge of an unrecorded deed of trust and thus not allowed to avoid the interest citing to cases such as Miebach, supra. and In re Prof'l Inv. Properties of Am., 955 F.2d 623 (9th Cir. 1992).

Respondent has argued that the Charities' lease was terminated with the nonjudicial foreclosure. However, that very much issue given the problems with the trustee sale, the knowledge of Union Street and the estoppel affirmative defense advanced in the answer and set forth in the trial brief as a matter for trial – which never occurred. Further, as Union Street accepted rents for February and March 2015 – it has acknowledged and affirmed the lease and thereby waive the forfeiture. Case law provides:

> If, after giving notice in the alternative to either comply with the provisions of the lease or vacate the premises, the landlord accepted rent from the tenant, for rental periods subsequent to the breach, it thereby waived the breach relied upon in the notice of

> October 21, 1950, and a new notice would then become necessary. In Batley v. Dewalt, 56 Wash. 431, 105 P. 1029, 1030, in holding that the acceptance of rent from the assignee of the lease constituted a waiver of a covenant against assignment, we said:
>
> > '* * * As soon as they accepted rent in advance from the assignees, with full knowledge of all the facts, the right to declare a forfeiture was waived as fully and completely as by the written consent provided for in the lease itself. Such is the rule announced by this court, and the rule is amply supported by authority.' [Citing cases.]
>
> The question arose again in Field v. Copping, Agnew & Scales, 65 Wash. 359, 118 P. 329, 330, 36 L.R.A.N.S., 488, where this court restated the rule:
>
> > '* * * The acceptance of rent, *eo nomine* is ordinarily a recognition of the continuance of the tenancy, and, where it is accepted after and with knowledge of the act of forfeiture by the tenant, it is a waiver of the forfeiture.'
>
> See also 16 R.C.L. 1132, Landlord and Tenant, § 653, et seq.; 32 Am.Jur. 749, Landlord and Tenant, § 883.

Signal Oil Co. v. Stebick, 40 Wash.2d 599, 603, 245 P.2d 217, 219 (1952). Union Street took lease payments directly from Charities. Two payments of $22,000 – the exact monthly amount in the Charities lease were accepted after the purported foreclosure sale. So, Union Street took an assignment, took subject to the lease, and now has taken lease payments without protest or attempt to revise. This is an acknowledgment of the lease, a waiver of past forfeiture, and recognition of the continuance of the tenancy.

Triable issues exists as to if Charities has a lease and if Union Street took "subject to" which is a quiet title/declaratory action type claim under RCW 7.28. We have an issue as to if Union Street took the

assignment subject to the lease as it had full knowledge of the possessor and the claim to the lease. That is well beyond the jurisdiction of an unlawful detainer action. A triable issue exists if Union Street has waived a forfeiture thus acknowledging the lease which is a determination beyond "mere possession." This case is illustrative of the issues that arise when some party other than the "purchaser at a trustee sale" tries to invoke RCW 59.12.032 via RCW 61.24.060 which may be why the plain statutory language limits the remedy sought to "purchasers at the trustee sale" and not successors or assignees. What if, for example, an assignee of a purchase at a trustee sale accepted rent and then assigned to another who accepted rent who in turn assigned again to a party who then started a foreclosure as a successor in interest to the purchaser at a trustee sale. The court can see the opportunity for intervening interests to occur, for recognition of a lease to occur and how an estoppel could operate. The question becomes: Where does the court draw the line as to who can foreclose under RCW 59.12.032? The purchaser at the trustee sale only? A first assignee? A fifth assignee? In what timeframe must the assignment occur? There is an easy answer: Read the statute and limit it to the plain language of "a purchaser at a trustee sale."

There are triable issue related to Union Street's status as a purchaser at a trustee sale or an assignee thereof. There are issues as to the knowledge of Union Street as to the Charities' lease. There are issues as to taking an interest in the real property with knowledge of an unrecorded interest. There are issues raised by the acceptance of rent

creating an acknowledgement of the lease. Given the questions as to if there is a recognition of the lease and is continuation, this goes to declaring rights in real property between conflicting claims which is covered under RCW 7.28 *et. Seq.*, not RCW 59.12 *et. seq.* For such reasons, the decisions of the trial court must be reversed and the case remanded to restore the dispossessed Charities to possession and the case dismissed as it is beyond the scope of an unlawful detainer action.

f. <u>The trial court erred in summarily ordering Charities to vacate.</u>

This case is quite unique in that it seems quite obvious that the trial court was in error in summarily ordering a party to vacate instead of going through the writ process. This error was compounded when Union Street then enlisted the Tacoma Police to chase off a Charities employee based on the order. Please note, <u>nothing</u> in such February 6, 2015 order by Judge Stoltz restored Union Street to possession.

The writ process has been in place for about a century and the notion of simply ordering people to vacate is illegal:

> It is clear in Washington that a landlord may not oust a holdover tenant by physical force against the tenant's person. In statements that are broader than required for disposition of the cases before it, the Supreme Court of Washington has repeatedly said that, because unlawful detainer is the exclusive remedy, a landlord is not privileged to enter the premises in any way to oust a holdover tenant, not even by peaceable means.

(footnotes omitted) 17 Wash. Prac., Real Estate § 6.80 (2d ed.). Case law support this:

> While the respondent may have been in default in the payment of rent and in other provisions of the lease, this did not warrant the appellants in unlawfully entering upon the premises and with force ejecting him therefrom and taking possession of his furniture. As was said in *Spencer v. Commercial Co.*, 30 Wash. 520, 71 P. 53, the common-law rule which allowed the lessor to regain possession by force no longer obtains. This rule, which made the landlord a law unto himself, has been supplanted by a statutory remedy, speedy, adequate, and orderly; and this remedy is exclusive.

Nelson v. Swanson, 177 Wash. 187, 191, 31 P.2d 521, 522 (1934). A more recent case confirms this as well:

> A lessor's unlawful lockout of one with a right to possession is a breach of the implied covenant of quiet enjoyment. *Aldrich v. Olson,* 12 Wash.App. 665, 667, 531 P.2d 825 (1975). *See Esmieu v. Hsieh,* 20 Wash.App. 455, 460, 580 P.2d 1105 (1978), *aff'd,* 92 Wash.2d 535, 598 P.2d 1366 (1979).

Olin v. Goehler, 39 Wash. App. 688, 692-93, 694 P.2d 1129, 1132 (1985). It is worth noting that nothing in March 6, 2015 order told the Union Street to retake possession. The court was in error; The Respondent then made the situation significantly worse. Besides, at such time there was still a pending trial in about 2 weeks. There was no legal basis to dispossess Charities on March 7, 2015. The March 6, 2015 order is clearly contrary to the detailed statutory framework and should be vacated. Charities should then be restored to possession and to the extent the Respondent has changed locks, changed security codes, altered anything...such information should be immediately provided to Charities.

Putting aside the jurisdictional problems, in unlawful detainer actions possession is restored upon execution by the sheriff after three

days of service of a writ duly ordered by the superior court RCW 59.12.100. No writ has been ordered. No writ has been issued. The case was bound over for trial on the unlawful detainer issues. If the Charities were to prevail, presumably no writ would have issued. So the notion of ordering a party to "vacate" is (1) premature and (2) improper as removal is, by statute, supposed to be done by writs. This entire situation has occurred because Union Street and the trial court refused to follow the statutory framework and simply expedited the process beyond all authority. The commissioner should have simply said, "this case is bound over for trial in front of the department" and the department should have held the trial. Instead, the trial court ordered Charities to summarily vacate when ruling on Charities' motion to extend possession. Frankly, Charities should not have had to ask to extend possession as it was entitled to possession until the case was decided and writs were issued – if so determined. What is important is that that Union Street does not have the right to retake possession until a writ has been executed. Assuming, for argument sake that this case is even entitled to proceed by way of RCW 59.12.032, then we would have the normal eviction summons and complaint called for under RCW 59.12.070 and .080. Then…if a plaintiff wants immediate possession they could seek a prejudgment writ under RCW 59.12.090 (which was not requested in this case) but requires a bond. But assuming the court issued a prejudgment writ and set a large bond for all the damages for disruptions of leagues, loss of teams…then the Sheriff is supposed to serve the writ on the defendant under RCW

59.12.100 which then allows the defendant three days to post a counter bond:

> **The sheriff shall, upon receiving the writ of restitution, forthwith serve a copy thereof upon the defendant**, his or her agent or attorney, or a person in possession of the premises, **and shall not execute the same for three days thereafter**, nor until after the defendant has been served with summons in the action as hereinabove provided, **and the defendant, or person in possession of the premises within three days after the service of the writ of restitution may execute to the plaintiff a bond to be filed with and approved by the clerk of the court in such sum as may be fixed by the judge, with sufficient surety to be approved by the clerk of said court, conditioned that he or she will pay to the plaintiff such sum as the plaintiff may recover for the use and occupation of the said premises, or any rent found due, together with all damages the plaintiff m**ay sustain by reason of the defendant occupying or keeping possession of said premises, and also all the costs of the action....

(bold added) RCW 59.12.100. But none of this happened. There is nothing in 59.12 RCW that just allows a judge to interlineate "defendant shall vacate on [fill in the date]". This was significant error that has turned the entire framework of the eviction statute on its head. The Superior Court Commissioner implicitly found factual issues in binding the matter over for trial. The determination of possession is subject to issues of fact:

> Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending; and in all cases actions under this chapter shall take precedence of all other civil actions.

RCW 59.12.130. And then...assuming for argument sake that the court found an unexpired lease and found the defendant was in unlawful

detainer and so entered judgment – the writ could not even issue for five days while the defendant is entitled to reinstate the lease under RCW 59.12.170:

> **If upon the trial the verdict of the jury or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises** ...
>
> When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued **until the expiration of five days** after the entry of the judgment, within which time the tenant or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied and the tenant restored to his or her estate....

RCW 59.12.170. Further, there is yet another statute to guard against forfeitures in such situations:

> **The court may relieve a tenant against a forfeiture of a lease and restore him or her to his or her former estate, as in other cases provided by law, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court, as provided in this chapter**. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition....

RCW 59.12.190. Finally, by simply decreeing that a party "shall vacate" the court has deprived the defendant of posting an appeal bond, staying the proceedings, and paying rents in the pendency of the appeal:

> A party aggrieved by the judgment may seek appellate review of the judgment as in other civil actions: PROVIDED, That if the defendant appealing desires a stay of proceedings pending review,

> the defendant shall execute and file a bond, with two or more sufficient sureties to be approved by the judge, conditioned to abide the order of the court, and to pay all rents and other damages justly accruing to the plaintiff during the pendency of the proceeding.

RCW 59.12.200.

It is expected that Union Street will argue it was entitled to possession 20 days after the trustee sale under RCW 61.24.060. Even assuming that to be true, how is this situation any different that if a landlord served a three day notice to pay rent or vacate and the tenant did not vacate? It is not enough to say "well, then, I have a right to possession so I will ignore the writ process and just chase a party off the property". However, this is what essentially happened and what the trial court allowed to occur. What has happened is a complete disregard for the proper writ process, the stripping of Charities of all of its rights to restore and/or bond and appeal and keep possession. It also has stripped Charities of the protections of the bonding process when a commercial landlord seeks immediate possession under RCW 59.12.090.

The undersigned, having been a real estate attorney for many years, feels somewhat silly of having gone through all of the statutory steps over and over in doing evictions when one simply needs to as a judge to order someone to "vacate" in less than 48 hours when no such motion was pending. As long as we are so streamlining court procedures, perhaps judges should summarily sentence criminal defendants to prison prior to trial. As long as we are depriving parties of property rights

without trial – why not liberty rights? Sarcasm aside, the point is that at each step in this process, the trial court has approved of conduct it would never dream of sanctioning in other settings. Yes, unwinding this mistake will be messy – but it is not an excuse to turn a blind eye to obvious trial court error.

The ignoring of the writ process in this case is so egregious that this court must step in, declare the error and remand to correct the error and for dismissal given the issues that go far beyond mere possession.

g. The trial court erred in not allowing Charities to try its affirmative defenses.

Again, the trial court summarily ordered a party to vacate without allowing a hearing on an applicable affirmative defenses which were listed out in the answer and include equitable and promissory estoppel, waiver, unclean hands, and breach of contract, among others. None of these defenses got to see the light of day in a court room because on a motion simply to continue operations – which should have been unneeded as the court commissioner had no authority to limit a parties use prior to trial if the commission was not going to issue a writ – the trial court simply ordered a party to vacate. This is somewhat akin to granting a summary judgment in the face of valid affirmative defenses. The proper procedure would be to bring a motion to strike the affirmative defenses on the basis that there is not genuine issue of fact. *See*, Harvey v. Obermeit, 163 Wash. App. 311, 327, 261 P.3d 671, 680 (2011); Oltman v. Holland Am. Line USA, Inc., 163 Wash. 2d 236, 242, 178 P.3d 981, 985 (2008).

One of the defenses is that of equitable estoppel which is recognized in Washington. Chem. Bank v. Washington Pub. Power Supply Sys., 102 Wash. 2d 874, 905, 691 P.2d 524, 542 (1984). In the present case there is evidence in the record that based upon agreement and representations of HomeStreet Bank officials, Charities entered into a new lease, commenced operations and ran a business. HomeStreet then ignored the existence of such lease in attempting to foreclose charities without notice. Doing so would be a repudiation of the lease it consented to in a fashion that would damage Charities. Such situation is illustrative of legitimate defenses that, had the case not been dismissed on jurisdictional grounds as argued by Charities, should have tried to the court or a jury. Charities is not asking this court to determine the merits of each and every affirmative defenses – that is what trial is for... if we had a trial.

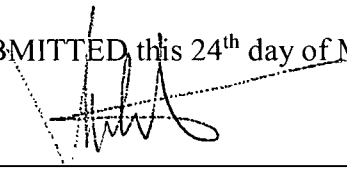
This is again demonstrative of a trial court that simply wanted to get to its preconceived notion of what should be done without the benefit of a trial. In doing so, Charities' rights were absolutely trampled. Again, for example, in a murder case – could this court even imagine ignoring an affirmative defense of, say, self-defense? In an assault case could a court deny a defendant the ability to present evidence of consent such as, for example, the parties were in a boxing match? No – a court is required to consider the evidence not only for the underlying case but also for any defenses. To ignore defenses and not even give a party the chance to establish a defense is so obviously wrong that this court should reverse the

summary process engaged in by the trial court with the urging and participation of Union Street.

IV. CONCLUSION

There are so many, many things that went wrong in this little unlawful detainer case that this court must reverse the below orders and judgment. There is a very clear process under the unlawful detainer statute that must be followed. It can only be invoked if you clearly fall within the statute's purview. It cannot be expanded to covers those who are ineligible and its protections cannot be disregarded in the sake of expediency. Charities was wrongfully dispossessed of its property by a court where jurisdiction was not proper and which did not follow the law. The trial court must be reversed.

RESPECTFULLY SUBMITTED this 24th day of March, 2016.



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CERTIFICATE OF SERVICE

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DATED this 24th day of March, 2016, at Tacoma, Washington.

BURNS LAW, PLLC

By _____
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